

Competitive Sourcing and Conflicts of Interest

For Informational Purposes Only

See your legal office for specific information regarding your unique situation

Statutory/Regulatory Background

- **Statutes and regulations having potential applicability to employees involved in the A-76 process**
 - **41 U.S.C. § 423, Procurement Integrity Act**
 - **18 U.S.C. § 208, Conflicting Financial Interests**
 - **DoD 5500.7-R, The Joint Ethics Regulation**
 - **18 U.S.C. § 207, Representational Restrictions**

Procurement Integrity Act

- **Four main provisions of Procurement Integrity Act**
 - Ban on disclosing procurement information
 - Ban on disclosing obtaining information
 - Requirement to report employment contacts
 - 1-year ban on accepting compensation from contractors
- **Applies to “federal agency procurements”**
 - A-76 related acquisitions are included
- **Disclosure ban**
 - Procurement Integrity Act prohibits disclosure of:
 - Source selection information
 - Contractor bid or proposal information
- **Obtaining ban**
 - Employees or contractors may not knowingly obtain
 - Source selection information
 - Contractor bid or proposal information
- **Contracting Officer can authorize**

Procurement Integrity Act

- **Employment contact reporting**
 - **If employee**
 - **Is participating “personally & substantially” in a procurement, and**
 - **Contacts, or is contacted by, a bidder or offeror regarding possible employment**
 - **Then employee must**
 - **Give written report to supervisor & JA, and** ☐
 - **Either (1) reject the possibility of employment or (2) be disqualified from working on procurement until job discussions end & there is either no arrangement for employment or organization is no longer a bidder or offeror**
- **For procurements conducted under A-76, participation in the following activities will not be considered “personal and substantial”**
 - **Management Studies**
 - **Preparation of in-house cost estimates**
 - **Preparation of MEO analyses**
 - **Furnishing data or technical support to be used by others in the development of performance standards, statements of work or specifications**
- **Right of first refusal**
 - **Arises subsequent to award pursuant to the terms of the contract**
 - **Therefore not an employment contact requiring report under Procurement Integrity provisions**

Procurement Integrity Act

- **Post-government employment**
 - People who serve in one of seven designated positions, or who make one of seven designated decisions, on a contract over \$10 million, may not accept compensation from the contractor for 1 year
 - No exception for offers of employment pursuant to the right of first refusal
- **Employees entitled to written legal opinion on whether ban applies to them**
- **Positions resulting in one year ban**
 - Procuring Contracting Officer
 - Source Selection Authority
 - Member of Source Selection Evaluation Board
 - Chief of Financial or Technical Evaluation Team
 - Program Manager
 - Deputy Program Manager
 - Administrative Contracting Officer
- **Decisions resulting in one year ban**
 - To award a contract or subcontract over \$10 million
 - To award a modification of a contract or subcontract over \$10 million
 - To award a task/delivery order over \$10 million
 - To establish overhead or other rates applicable to a contracts valued over \$10 million
 - To approve issuance of a contract payment or payments over \$10 million
 - To pay or settle claim over \$10 million

Conflicting Financial Interests

- **Officers & Employees are prohibited by criminal statute, 18 U.S.C. § 208, from**
 - Participating “personally and substantially”
 - In any “particular matter” in which they (or any person whose interests are imputed to them) have a financial interest
 - If the particular matter will have a “direct and predictable effect” on that interest
- **Employee’s financial interests include those of**
 - Employee’s spouse or minor child
 - Organization in which employee serves as officer, director, trustee, general partner or employee (i.e., off-duty employment)
 - Persons/organizations with whom the employee is negotiating or has other arrangement for prospective employment
- **Remedies for conflicts**
 - Disqualification through non-participation in the matter
 - Written notice to supervisor required
 - Divestiture of Interest
 - Waiver for remote, insubstantial or inconsequential interests

Joint Ethics Regulation

- **Impartiality in performing official duties**
 - DoD 5500.7-R (JER) proscribes *appearances* of conflicts of interest
 - Similar to 18 U.S.C. § 208 but broader
 - If circumstances would cause a reasonable person with knowledge of the relevant facts to question the employee's impartiality in the matter, then employee should not participate unless authorized by the supervisor
 - CANNOT evaluate if job potentially affected

- **Representational Restrictions**
 - 18 U.S.C. § 207 states that if employees
 - “Personally and substantially” participate in a particular matter,” *and*□
 - The particular matter involves “specific parties” at the time of the participation, *then*□
 - Employees may never (for life) knowingly make any communications to or appearances before any government employee with the intent to influence that employee on that same particular matter
 - On behalf of anyone other than the United States